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Nos. 85-98 and 85-99

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANSCHUETZ & CO., GMBH,
Petitioner,
v.
MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,
Respondents.

MESSERSCHMITT BOLKOW BLOHM, GMBH,
Petitioner,
v.
WALKER, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONERS' BRIEF IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEF FOR THE UNITED STATES

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PETITIONERS' BRIEF IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEF FOR THE UNITED STATES

INTRODUCTORY STATEMENT

Petitioners have requested this Court to decide whether the Hague Evidence Convention places any limits on the authority of U.S. courts to order the production of foreign documents or the examination of foreign witnesses

in the United States. In his brief for the United States as amicus curiae (hereinafter cited as "Br."), the Solicitor General adopts the same position that respondents took last August: The Court should deny certiorari because the decisions below are correct. Br. at 6, 20. Last August we replied: "Even if this were true, of course, it would in no way argue against the Court's granting certiorari to resolve a direct conflict among lower federal and state courts over a recurring issue of increasing importance to the administration of justice." 85-98 Pet. Reply Br. at 4. Strictly speaking, that observation is all the response that the Solicitor General's brief requires.[1]

Nevertheless, because of the conclusion that the Solicitor General seeks to draw from his position on the merits, we are constrained to burden the Court with a rather longer response. While expressly conceding the importance of the question we have presented, the Solicitor General attempts to establish that, when the merits are correctly understood, there is really no "meaningful" conflict among the state and lower federal courts. As we show herein, his effort to argue away the express disagreements among the courts over the applicability of the Hague Evidence Convention to foreign discovery is based in major part upon an understanding of the principle of comity that divests it of all legal content. In addition, as we further show, the Solicitor General incorrectly characterizes the positions on the merits adopted by the Fifth Circuit and by petitioners, further contributing to the erroneous impression created by his brief that there exists no substantive legal conflict over the important question presented in our petitions.

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[1] We wish to advise the Court that while there have been no further proceedings in No. 85-98 since the decision below in that case, in No. 85-99 trial of the claims of the non-settling plaintiffs is scheduled to commence on April 14, 1986, without petitioner Messerschmitt having made production of the documents sought from Germany.

DISCUSSION

I. The question presented by petitioners is important because refusal to use Hague Evidence Convention procedures for extraterritorial discovery puts the courts of the United States in recurring and unnecessary conflict with the judicial sovereignty of other nations.

The Solicitor General does not question the importance of the question presented in these cases. To the contrary, in one of the few passages addressing whether the Court should review these cases rather than how the Convention should be interpreted or the principle of comity applied, the Solicitor General makes the following statement:

> "These cases present recurring questions concerning the use of the Hague Evidence Convention to obtain foreign evidence for use in private suits. We agree with petitioners that these questions are important."

Br. at 6. Naturally, the significance of this one simple statement tends to get lost in the elaborate discussion of the merits that occupies the remainder of the brief.

Since our last filing here in August 1985, the importance of what role the Hague Evidence Convention is or is not to play in U.S. judicial proceedings has been further underscored by governments of major U.S. trading partners. First, the Federal Republic of Germany has submitted a third diplomatic note to the U.S. government, firmly rejecting the position adopted in the Solicitor General's brief and adhering to its position that the decision below violates the international law protecting German sovereignty and should be reviewed by the Supreme Court of the United States.[2] Second, we refer the Court to a further diplomatic note, dated November 3, 1985, from the Government of France stating that na-

[2] This note and the second German note of November 26, 1985, are reproduced in Appendices 1 and 2.

tion's position that Hague Evidence Convention discovery procedures are obligatory under international law and reiterating its request that this Court review the decisions below.[3]

These communications from Germany and France, together with the diplomatic note from Great Britain (85-98 Pet. Reply Br. at 3a-4a), indicate that the foreign discovery technique authorized by the decisions below is regarded by other nations as violating international law and confirm that its use should not be permitted to continue without review by this nation's highest court. Appended to this brief is an explication of the international law principle reflected in the diplomatic interventions of Germany, France and Great Britain prepared for petitioners' liability insurer by the international law scholar Karl M. Meessen.[4]

The substantial attention and concern expressed by American trading partners over this case is all the more troubling because this international conflict is not required by any real clash of sovereign interests. In truth, there is no difference of interests between the United States and Germany here that could not be reconciled by taking recourse to the Convention that was, after all, negotiated by the Executive Branch, made binding U.S. law by ratification and (before the decisions here) frequently and successfully used by U.S. litigants seeking evidence from Germany. As set forth in our petitions, truly necessary evidence is likely to be obtained by use of the Convention. If for some reason it were not, however, U.S. courts could then consider what further action might be appropriate to ensure that litigants were treated fairly (and, of course, the German government could not at that point protest U.S. failure to try Convention pro-

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[3] This second French note, together with an informal translation, is reproduced in Appendix 3.

[4] Professor Meessen's analysis is contained in Appendix 4.

cedures). Unless this Court acts to correct the decisions below, the Convention will never be given the chance to play its role of eliminating the tensions that arise because of the different procedures used by the judicial systems of major Western nations with respect to obtaining evidence.

II. The Solicitor General attempts to minimize the conflict among the courts over the Hague Evidence Convention by reinterpreting both the legal doctrine of comity and the decisions of the Fifth Circuit.

While the Solicitor General does not question the importance of the question presented by these cases, he does claim that there is no "meaningful" conflict over it among the state and lower federal courts. Br. at 19 & n.24. The Solicitor General tries to make the conflict and confusion over the role of the Hague Evidence Convention disappear by pursuing two argumentative strategies.

First is the advocacy of a comity analysis that is so unstructured and ultimately devoid of substantive legal content that it generates no rule of decision for a court faced with a choice between discovery under the Evidence Convention or discovery under the Federal Rules. In the Solicitor General's brief, comity is a "principle" in name only, that by its nature cannot be inconsistently applied by different courts.

To diminish the significance of the express conflicts among the state and lower federal courts, it is not enough for the Solicitor General to posit his own open-ended notion of comity, for the plain meaning of the decisions below is that the Fifth Circuit understands comity quite differently from the Solicitor General. The Solicitor General is therefore forced to pursue a second strategy: deconstruction of the decisions below. Instead of laying down a clear (albeit, in our view, erroneous) rule governing the applicability of the Evidence Convention to for-

eign discovery, the Fifth Circuit is interpreted as providing no more guidance—no more *content* that another court (or nation) could agree or disagree with—than the Solicitor General's own standard-less comity analysis.

In this section of our brief we consider each of these remarkable arguments in turn.

A. The Solicitor General understands the doctrine of comity in non-juridical terms unsuitable to application of a legal principle by the Judicial Branch.

Foreign litigants and their sovereigns are now urging in federal and state courts that compulsory discovery of evidence located in their territory violates international law unless such discovery is conducted in conformity with the Hague Evidence Convention. In response to these claims, many U.S. courts have applied the principle of comity to determine the extent to which, if at all, the conflict between U.S. discovery and foreign sovereign interests should be resolved by substituting Convention discovery for discovery under the Federal Rules or comparable state rules.

State and lower federal court applications of the comity principle have resulted in two clear but conflicting positions: that first use of Convention procedures is normally required to discover information located abroad (*Starcher* and other cases cited at 85-98 Pet. 12 n.23), and that use of Convention procedures is not required so long as the foreign-located information is ordered to be produced within the United States (*Anschuetz* and cases cited at 85-98 Pet. 12 n.24). It is the conflict between these two inconsistent approaches—one of which, we submit, respects the Convention while the other emasculates it—that the Court is being asked to resolve in these cases.[5]

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[5] The third major position—that the Convention is the exclusive means of discovering foreign-located information (*see* cases cited at 85-98 Pet. 15 n.29)—rests largely on an interpretation of the

In stark contrast to these clear, administrable rules governing the substitution of Convention discovery for normal U.S.-style discovery, the Solicitor General's amicus brief urges adoption of a comity analysis that generates no rule at all. With respect to extraterritorial discovery, U.S. courts are counseled to evade foreign recrimination by being "flexible" and exercising their discretion to consider the "wide variety of factors that might be relevant in any particular instance." Br. at 12. Although we can find a list of "some" of these factors in the 1965 Restatement of U.S. Foreign Relations Law (*id.*), we must remember that these factors are finally "intractable" (Br. at 20) and that neither this Court nor any other appellate court can give any "additional specific guidance" on how to apply the principle of comity in any particular case in which foreign discovery is sought. Br. at 20; and *see id.* at 12, 14, 18-19.

Arrayed against this elusive notion of comity are the specific provisions of the Federal Rules of Civil Procedure enabling litigants to discover information, wherever located, that is within the control of any person over whom a U.S. court can assert personal jurisdiction. Thus, for the Solicitor General, there is no question but that the discovery orders entered here were "in accordance with the Federal Rules of Civil Procedure" (Br. at 1), that an "American court has the power to demand the production

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Convention rather than a comity analysis. Evidently the United States once understood the Convention as being exclusive. *See* Brief for the United States as Amicus Curiae at 6, *Volkswagenwerk A.G. v. Falzon*, 104 S.Ct. 1260 (*appeal dismissed*), *reh. denied*, 104 S.Ct. 1932 (1984): "The parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted." (We note that while Professor Meessen's analysis strongly supports, from the perspective of customary international law, our position on the first use of Convention procedures, it does not support the position advanced in the diplomatic notes, the Solicitor General's *Falzon* brief, and in our petitions (to which we adhere) that the Convention should be interpreted as providing the exclusive means for obtaining foreign evidence.)

of evidence in the United States from foreign nationals" (*id.* at 8), and that "American courts, of course, apply their own procedural rules to adjudicate" claims against foreign nationals. *Id.* Under the Solicitor General's approach to comity, the law does not recognize any special considerations applicable to foreign nationals in our courts; insofar as the exercise of U.S. discovery jurisdiction is moderated, it is a matter, not of law, but of grace alone. For the Solicitor General, the principle of comity is not really part of our "law" at all.

Obviously, if this Court can be persuaded that the principle of comity is so "intractable" that it amounts to nothing more than an admonition to think pragmatically about "international friction," then the lower court conflicts over the Evidence Convention's role in foreign discovery will indeed largely disappear as an issue for appellate resolution. If every case turns on the judge's individual reaction to a unique constellation of intractable factors, then it is going to be intractably difficult to argue, as we propose to do, that a particular case was rightly or wrongly decided as a matter of law, or that one decision really does or does not conflict with another.

The Solicitor General's understanding of comity may be entirely adequate and appropriate for the Executive Branch in its conduct of U.S. foreign relations (at least insofar as questions of international legal obligation do not intrude), but it is inadequate and inappropriate for resolving justiciable issues unavoidably arising in cases within the province of the Judicial Branch. Comity, in the legal sense, does not denote a diplomatic strategy for advancing U.S. national interests while avoiding or minimizing retaliation by foreign nations. That is a political understanding of comity. The legal concept of comity is a principle of conflict of laws, enabling courts to choose when and how far to apply domestic law, and when and how far, on the other hand, to recognize interests protected by foreign law. Comity, in the legal sense,

has been a generator of choice-of-law rules from its first appearance as Huber's third maxim from *De conflictu legum* in the margin of *Emory v. Grenough*, 3 U.S. (3 Dall.) 369 (1797), down to its use last Term in *Mitsubishi v. Soler*, 105 S.Ct. 3346 (1985), to determine whether an arbitration clause is enforceable in an international commercial contract, even if it would not be in a purely domestic context.[6]

When the question is whether foreign discovery should be accomplished by Hague Evidence Convention procedures rather than by the Federal Rules, comity as legal principle would not have courts merely consider everything they can think of, remain flexible, and avoid saying anything so definite that a foreign nation could understand what was going on and retaliate. Comity in its legal sense guides courts to principled decisions of conflicts questions of the kind posed in the instant cases. Following the classical formulation in *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), the courts of the United States should recognize and give effect in the United States to the laws of another nation (here, German law making the discovery of information located in Germany subject to German judicial supervision and German civil procedure), having due regard both to international duty and convenience (here, the procedures agreed to by the parties to the Hague Evidence Convention) and to the rights of U.S. citizens or of other persons who are under the protection of U.S. law (here, the legal procedures available to litigants in U.S. courts for the discovery of evidence needed to adjudicate their claims in accordance with American standards of justice).

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[6] For a discussion of the distinction between the legal and political interpretations of comity, see Maier, *Extraterritorial Jurisdiction At a Crossroads*, 76 Am. J. Int'l L. 280, 283-84, 303-16 (1984). For an explanation of how the analysis of comity factors generates choice-of-law rules, see Restatement (Second) of Conflict of Laws § 6, Comment *c*.

We urge that, upon analysis, the principle of comity will be seen to require first resort to Hague Convention discovery procedures. Respondents, in contrast, say that the comity principle permits ordinary discovery under the Federal Rules whenever a party is ordered to make production in the United States. Notwithstanding the Solicitor General's quite different view, we must insist that petitioners and respondents are having a justiciable dispute capable of resolution one way or the other by judicial application of a coherent legal principle.

B. The plain meaning of decisions below and other courts' readings of those decisions contradict the Solicitor General's argument that the Fifth Circuit did not hold that comity can be satisfied by ordering that production of foreign evidence occur in the United States.

The Solicitor General's task of minimizing the conflict over the Hague Evidence Convention among state and lower federal courts would have been far easier if the Fifth Circuit had taken the same indeterminate approach to comity in these cases as the Solicitor General now urges. Because it rather plainly did not, however, the Solicitor General must creatively reinterpret the decisions below. He sets the stage for this deconstruction by characterizing the decisions below as "essentially correct" (Br. at 6) or "ultimately correct" (*id.* at 13), though containing "some troublesome language" (*id.* at 6) and providing only a "rather cursory" comity analysis. *Id.* at 13. Then, in footnote 21 on page 17 of his brief, history is revised.

When the court below said in *Anschuetz*, in the second sentence of a paragraph beginning "we hold," that "[t]he Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules" (85-98 Pet. 26a; Br. at 4), it really meant to say, according to the Solicitor General, that "the

Convention is not exclusive." Br. at 17 n.21. To understand that the court is not deriving from the principle of comity a clear, administrable rule—which would be "plainly overbroad" (*id.*) and inconsistent with a flexible approach to an intractable problem—the Solicitor General urges that we view the court's "poorly phrased observation" "in context." *Id.* Let us do just that, beginning with the context to which the Solicitor General refers and then considering some of the context he ignores.

The Solicitor General's reinterpretation gains no support from the court's subsequent statement that use of Convention procedures "may" be ordered if "the discovery sought by Gijonesa of Anschuetz *in Germany* becomes particularly intrusive." 85-98 Pet. 26a (emphasis added). That statement is fully consistent with the plain meaning of the court's assertion that Convention procedures have no application when the discovered information is produced in the United States. Nor does the "brief comity analysis" (Br. at 17 n.21) undertaken by the Fifth Circuit in *Messerschmitt* contradict the court's clear, direct statement. That comity analysis, one must recall, led swiftly to the firm conclusion, repeatedly described as being the holding of *Anschuetz* (85-99 Pet. at 2a, 3a, 5a-6a, 6a-7a), that comity presents no obstacle to an order that "a party admittedly subject to the personal jurisdiction of a United States court produce [evidence] . . . in the United States." 85-99 Pet. 5a.

That exhausts the context in which the Solicitor General would have the Court view the statement that the Hague Evidence Convention does not apply when foreign-located information is ordered to be produced in the United States. But there is more context for that statement in the *Anschuetz* decision, such as the following:

> "We are aware, of course, that the district court in sustaining the magistrate's ruling, has ordered depositions. But where the district court's order is an order that discovery will be compelled only in the

United States, there can be no invasion of German sovereignty." (85-98 Pet. 12a n.13)

"[The Convention] is, on its face, addressed solely to the procedures to be used for the gathering of evidence within the borders of countries other than those in which the legal proceeding is pending. . . . No authority has been suggested for the notion that letters of request were ever used or requested to be used to enable litigants to obtain information within the very country in which they are litigating." (85-98 Pet. 14a n.19)

"We find particularly apt the [*Graco*] court's observation that the Convention does not require deference to a foreign country's judicial sovereignty over documents, people, and information—if this is really how civil law judicial sovereignty is understood—when such documents are to be produced in the United States." (85-98 Pet. 17a-18a)

"In essence, matters preparatory to compliance with discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention." (85-98 Pet. 18a)

"The district court should remember that Anschuetz may make available any documents and witnesses in Germany if this is more convenient to the parties without implicating German sovereignty. If Anschuetz is not voluntarily forthcoming in Germany, the court can order the production of documents and the examination of witnesses to occur in the United States to avoid any infringement upon German sovereignty." (85-98 Pet. 27a)

In light of the foregoing, petitioners regard as simple truth the Fifth Circuit's statement last December that in *Anschuetz* "we held that . . . the 'Hague Convention has no application at all to the production of evidence *in this country* by a party subject to jurisdiction of a district court pursuant to the Federal Rules.' " *In re*

Ljusne Katting, A.B., No. 85-2573 (5th Cir. Dec. 11, 1985), slip op. at 7-8 (emphasis in original).

Other courts have had no trouble understanding the so-called poorly-phrased observations in the decisions below. In a decision rendered in January of this year, the Eighth Circuit upheld a discovery order under the Federal Rules requiring production in the United States of documents and information located in France. The court stated:

> "[W]e agree with the analysis of the Fifth Circuit in *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985), (No. 85-98), that '[t]he Convention does not require deference to a foreign country's judicial sovereignty over documents, people, and information—if this is really how civil law judicial sovereignty is understood—when such documents are to be produced in the United States.'
>
> * * * *
>
> "Hence, we conclude that the Hague Convention does not apply to the discovery sought in this case 'because the proceedings are in a United States court, involve only parties subject to that court's jurisdiction, and ultimately concern only matters that are to occur in the court's jurisdiction, not abroad.' *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729, 731 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 84-99)."

In re Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124-25 (8th Cir. 1986).[7] Other courts have equally well understood the decisions below.[8]

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[7] We are advised that a petition for a writ of certiorari to review the *Aerospatiale* decision will be filed in this Court on April 16, 1986.

[8] Contrary to the impression created by the discussion in footnote 21 of the Solicitor General's brief, all four of the lower court decisions cited there—including *Work* and *Griffis*—read the decision below as holding that the Evidence Convention has no applica-

In sum, the Fifth Circuit holds, as do some other courts, that where production occurs in the United States, Hague Convention procedures have no application to party discovery of foreign-located information. The West Virginia Supreme Court holds, as do some other courts, that first resort must be made to Hague Convention procedures for party discovery of foreign-located information. The rules established by these holdings conflict both with each other and with the Solicitor General's position that no rule, but only a "flexible" approach, should govern the discovery of evidence located abroad.

III. Contrary to the Solicitor General's statements, petitioners (i) do not urge that first use must be made of the Hague Evidence Convention in every case involving foreign discovery and (ii) do dispute the scope and relevance of the discovery sought in these cases.

We have two further and final comments about the Solicitor General's brief.

First, we reject the statement that we and the Federal Republic of Germany assert "the broad proposition that principles of international comity obligate American courts to seek first use of the Hague Evidence Convention in *every* instance where litigants seek discovery abroad." Br. at 14 (emphasis in original). Obviously, comity requires first use of Convention discovery procedures only where, as in the instant cases, normal U.S. discovery would violate foreign sovereignty—*i.e.*, fail to recognize the legislative, executive or judicial acts of the foreign nation that govern the disclosure or non-disclosure of information located within its territory.[9] Moreover, the

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tion to party production in the United States of foreign-located information.

[9] While the Solicitor General purports not to understand the "precise nature of Germany's 'judicial sovereignty'" as it is affected by U.S.-style discovery (Br. at 15 n.18), enlightenment can be obtained from the sources elsewhere cited by the Solicitor Gen-

comity principle in U.S. law, which mandates a due regard for the rights of its own citizens and other persons under the protection of its laws, obviously will not require litigants in U.S. courts to use Convention procedures in any instance in which such procedures would be futile and fail to "provide a meaningful tool for U.S. litigants to obtain discovery from abroad." 85-98 Pet. Reply Br. at 5; Appendix 4, pp. 19a-25a.

Second, we caution the Court against the misunderstanding inherent in the statement that "[p]etitioners do not presently dispute the scope or relevance of the evidence sought." Br. at 16. Obviously, petitioner Anschuetz objected and continues to object, see 85-98 Pet. Reply Br. at 2-4, to producing information of the breadth and irrelevance called for by the Rule 34 document discovery requests described in footnote 2 on page 4 of our petition in No. 85-98. Moreover, Anschuetz objects to making its employees living and working in Germany available for Rule 30(b)(6) depositions unsupervised by a German judge, whether those depositions occur in Kiel (as the district court ordered) or in New Orleans (as the court of appeals would have it). Likewise, petitioner Messerschmitt's inability to object on Rule 26(b) grounds to the document discovery sought from it (85-99 Pet. 11a) should not be taken to mean that Messerschmitt does not object to producing the documents; it does.

It is not petitioner's satisfaction with the discovery ordered in these cases that has caused them and the Federal Republic of Germany to pursue all the way to this Court the claim that respondents' discovery requests for information located in the territory of Germany

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eral himself (Br. at 6 n.5) and, especially, from the section of Professor Meessen's analysis entitled "German Interests." Appendix 4, pp. 32a-38a.

should be made, at least in the first instance, through Hague Evidence Convention procedures rather than under the Federal Rules. Precisely because they object to the overbreadth and irrelevance of the discovery against them permitted under the Federal Rules, they have urged that respondents be required to use instead the discovery procedures of the Convention. The Convention procedures will, petitioners submit, yield relevant, admissible evidence necessary to adjudicate respondents' claims but, because of the involvement of a German judge applying German law as to "the methods and procedures to be followed" (Art. 9) and any "privilege or duty to refuse to give the evidence" (Art. 11), will not permit a fishing expedition into information in Germany about which the most that can be said is that it is reasonably calculated to lead to the discovery of admissible evidence.

CONCLUSION

Accordingly, petitioners respectfully submit this brief for the Court's consideration and, referring particularly to the appended diplomatic notes from Germany and France, renew their requests that the petitions for writ of certiorari be granted.

Respectfully submitted,

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April 11, 1986

APPENDICES

APPENDIX 1

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to make the following comments on the amicus curiae brief for the United States in the matters of Anschuetz & Co. GmbH., petitioner, v. Mississippi River Bridge Authority, et al., and Messerschmitt-Boelkow-Blohm, GmbH., petitioner, v. Virginia Walker, et al.

The Embassy has taken note, with surprise, of the US Government's recommendation to the US Supreme Court not to grant certiorari in a matter on which the Federal Republic of Germany has, throughout the years, continuously expressed its grave concern.

In its brief, the US Government seriously underestimates the German Federal Government's resolve concerning German judicial sovereignty which is embedded in the German constitution, and, therefore, cannot be waived by the government. Whether evidence is to be taken on German territory or taken from German territory to another country, the German parties or witnesses concerned have a constitutional right that a German judge supervise the process of taking evidence lest certain fundamental rules of German law be violated.

The respect of another country's judicial sovereignty is the very principle of international law upon which all international treaties on judicial assistance are based and which the Federal Republic of Germany hoped to see observed by the United States when becoming a party to the Hague Evidence Convention.

Furthermore, the US Government's brief fails to take account of the fact that evidence taken in the Federal

Republic of Germany under the procedure of the Hague Evidence Convention can be utilized in American courts.

Verbatim transcripts of witnesses' testimony can be taken and American parties may be present and ask questions at court hearings. Although the taking of documentary evidence is not yet possible in the Federal Republic of Germany during the pre-trial stage, witnesses may be questioned by German courts on the contents of documents located in the Federal Republic of Germany to the extent such documents are relevant to the litigation. The practice of substituting the testimony of witnesses for pre-trial production of documents has in the past been used by US parties seeking evidence in the Federal Republic of Germany.

Thus, through exhausting convention procedure, infringement upon German sovereignty can be avoided without impairing the US interest in granting US plaintiffs such access to evidence as they may need to obtain proof for their claims against German defendants.

The Federal Republic of Germany continues to support petitioners' request in Anschuetz that the US Supreme Court grant certiorari and render a decision taking into account the respect of other countries' sovereignty which is the fundamental principle on which international law is based.

Washington, D.C., April 8, 1986

APPENDIX 2

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and, referring to its various discussions with the Department on the *Anschütz* case, has the honor to point out, once again, that the decision in this case relating to the applicability of the Hague Evidence Convention, will be of cardinal importance for further legal relations between the Federal Republic of Germany and the United States.

Therefore, there is an urgent need that certiorari be granted by the US Supreme Court for allowing review of the decision of the US Court of Appeals for the Fifth Circuit which has led German-American judicial assistance in civil and commercial matters into an impasse.

The Federal Minister of Justice is in the process of preparing regulations which will enable German courts to execute requests for production of documents under the Hague Evidence Convention. They will follow the lines of the restricted reservation which Great Britain has made to article 23 of the Convention.

Such regulations would be based upon § 14 paragraph 4 of the German statute of December 22, 1977 (BGBl I 3105) on the implementation of the Hague Evidence Convention. They require the consent of the Bundesrat i.e. the Länder Chamber of the German Parliament.

The Ministry of Justice has already been discussing the regulations with representatives of the Länder. However, the discussions are now stagnating in view of the holding of the court of appeals which limits the Convention's applicability to non-party witnesses, for, the restrictive interpretation which the court of appeals put

on the Convention, would make such regulations meaningless.

The regulations would have the practical effect to restrict the German reservation so as to enable German courts to render judicial assistance for pre-trial discovery of documents to the extent that the fundamental principles of German Law of Procedure are not violated (see article 9 paragraph 2 of the Convention).

If, however, the holding of the court of appeals were to stand, the Convention would only very rarely be used, as requests for judicial assistance usually involve party witnesses.

Even after the liberalized procedures for executing pre-trial discovery of documents requests will be applicable, US courts, relying on the Anschütz decision, could refuse to use them. Thus, the regulations would not have achieved their purpose.

Furthermore, the holding of the Fifth Circuit Court of Appeals seriously affects the reciprocity in international legal assistance intended by the Convention. German courts would continue to honor requests concerning party witnesses made under the Convention, while US courts will be able to deny such assistance on the grounds that the Convention is not applicable.

The Embassy would be very grateful to the Department of State for bringing the above considerations to the attention of the US Department of Justice.

Washington, D.C., November 26, 1985

Department of State
Washington, D.C.

APPENDIX 3

Ambassade de France aux Etats-Unis
Washington, D.C.

3 Novembre 1985

L'Ambassade de France présente ses compliments au Département d'Etat et, se référant à la note de l'Ambassade du 4 août 1985, a, sur instruction de son Gouvernement, l'honneur de lui faire savoir ce qui suit.

Dans sa note précitée, l'Ambassade avait appelé l'attention des autorités américaines sur le vif désir des autorités françaises de voir la Cour Suprême des Etats-Unis accepter d'examiner le recours de deux sociétés allemandes, Anschuetz et Cie et Messerschmitt Bolkow Blohm, en raison des implications directes que ces deux affaires ont sur l'interprétation et l'application de la Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale.

Les autorités françaises souhaitent souligner à nouveau l'importance qui s'attache au respect de la convention du 18 Mars 1970, qui constitue, dans les relations entre les Etats parties, le seul moyen juridique pour obtenir des preuves en matière civile ou commerciale pour les nécessités d'une procédure judiciaire.

Elles rappellent tout d'abord que l'entraide judiciaire internationale ne peut s'exercer que dans le respect de la souveraineté de chaque Etat et plus particulièrement du principe de la territorialité des lois qu'en conséquence le fait pour une autorité judiciaire d'un Etat d'exiger la communication de documents ou de renseignements se trouvant placés sous la juridiction d'un Etat étranger, sans l'autorisation de ce dernier et sans respecter les procedures en vigueur dans cet Etat, constitue, au regard du droit international, une atteinte à la souveraineté dudit Etat.

C'est pour éviter cet écueil et pour permettre l'établissement d'une nécessaire coopération en matière judiciaire entre Etats souverains qu'a été conclue la Convention de la Haye du 18 mars 1970. Un examen du texte de cette convention montre clairement que les demandes d'obtention de preuves civiles ou commerciales par une autorité judiciaire d'un Etat partie à la convention sur le territoire d'un autre Etat également partie ne sont recevables par la partie requise que si ces demandes sont formulées dans le respect des conditions strictes établies par la convention, ce qui constitue une reconnaissance de la souveraineté judiciaire de l'Etat requis.

L'article 27 de la Convention confirme encore cette conception :

Cet article stipule que les dispositions de la présente convention ne font pas obstacle à ce qu'un Etat contractant :

c) permette, aux termes de sa loi ou de sa coutume interne, des méthodes d'obtention de preuves autres que celles prévues par la présente convention.

Cette formulation négative prouve que la recherche de preuves civiles ou commerciales par des moyens non prévus par la convention est effectivement subordonnée au consentement de l'Etat requis. Elle signifie, en définitive, que tout ca qui n'est pas expressément prévu par la convention ou par la législation de l'Etat requis est interdit.

Il apparait ainsi que la Convention du 18 mars 1970, est, à défaut d'une autorisation explicite de l'Etat requis, le passage obligé pour obtenir entre Etats parties des preuves en matière civile ou commerciale en vue de procédures judiciaires.

Les autorités françaises souhaitent en outre souligner que le Parlement français a voté le 16 juillet 1980 une loi qui interdit la recherche de documents ou renseigne-

ments d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de procédure judiciaires ou administratives étrangères ou dans le cadre de celles-ci. Toutefois cette loi réserve l'application des procédures prévues par les accords internationaux auxquels la France est partie et valorise ainsi ces accords, tout particulièrement la convention de La Haye.

C'est pour toutes ces raisons que les autorités françaises considèrent qu'il est dans l'intérêt commun de veiller au respect des dispositions de la Convention de La Haye. Elles réitèrent en conséquence auprès du Département d'Etat leur souhait de voir la Cour Supréme des Etats-Unis accepter les deux recours sus-mentionnés.

L'Ambassade de France saisit cette occasion pour renouveler au Département d'Etat les assurances de sa très haute considération.

DEPARTMENT OF STATE
DIVISION OF LANGUAGE SERVICES

(Translation)

118204
LS NO. RHC/MM
French

Embassy of France in the United States

Washington, November 23, 1985

The Embassy of France presents its compliments to the Department of State and, in reference to the Embassy's note of August 4, 1985, on instructions of its Government, has the honor to inform it of the following:

In the aforementioned note, the Embassy called to the attention of the United States authorities the strong wish of the French authorities that the United States Supreme Court agree to examine the appeal of two German firms, Anschuetz and Co. and Messerschmitt Bolkow Blohm, because of the direct implications that these two cases have on the interpretation and application of the Hague Convention of March 18, 1970, on the taking of evidence abroad in civil or commercial matters.

The French authorities wish to reiterate the importance they attach to compliance with the Convention of March 18, 1970, which constitutes, in relations between the States parties, the only legal means of obtaining evidence in civil or commercial matters for the requirements of a judicial procedure.

They recall first that international judicial assistance can take place only with respect for the sovereignty of each State and particularly for the principle of the territoriality of laws, and consequently for a judicial authority of one State to demand the production of documents or information that are under the jurisdiction of a foreign State, without its authorization and without

respecting the procedures in force in that State, would constitute under international law an infringement of the sovereignty of that State.

It was in order to avoid this difficulty and make it possible to establish the necessary cooperation in judicial matters between sovereign States that The Hague Convention of March 18, 1970, was concluded. An examination of the text of this Convention clearly shows that requests for the production of civil or commercial evidence by a judicial authority of a State party to the Convention in the territory of another State party are not admissible by the requested Party unless such requests are formulated in conformity with the strict conditions established by the Convention, which constitutes recognition of the judicial sovereignty of the requested State.

Article 27 of the Convention reconfirms this concept:

This article stipulates that the provisions of the present Convention shall not prevent a Contracting State from:

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

This negative wording proves that the search for civil or commercial evidence by means not covered by the Convention is indeed dependent upon the consent of the requested State. In the final analysis, it means that whatever is not expressly covered by the Convention or by the laws of the requested State is prohibited.

Thus it appears that the Convention of March 18, 1970, in the absence of explicit authorization by the requested State, is the obligatory channel for obtaining evidence between States parties in civil or commercial matters for purposes of legal procedures.

The French authorities also wish to emphasize that on July 16, 1980, the French Parliament enacted a law that prohibits the search for documents or information of an economic, commercial, industrial, financial, or technical nature for the purpose of compiling evidence for foreign judicial or administrative procedures or in the context of such procedures. However, this law retains the application of the procedures provided for in the international agreements to which France is party and thus confirms such agreements, particularly The Hague Convention.

For all these reasons the French authorities consider it in the common interest to ensure that the provisions of The Hague Convention are respected. Consequently they reiterate to the Department of State their wish to have the United States Supreme Court hear the two aforementioned appeals.

[Complimentary close]

[Initialed]

APPENDIX 4

Karl M. Meessen [1] March 31, 1986

THE INTERNATIONAL LAW ON TAKING EVIDENCE FROM, NOT IN, A FOREIGN STATE:

THE ANSCHÜTZ AND MESSERSCHMITT OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.[2]

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[1] Dr. iur.; Professor of Public Law, International Law and European Law at the University of Augsburg, Federal Republic of Germany; currently Visiting Professor of International Law at the Law School of the University of Chicago; Special Consultant on International Economic Law to the American Law Institute regarding the Restatement of the Foreign Relations Law of the United States (Revised).

[2] *In re Anschuetz Co. GmbH*, 754 F.2d 602 (5th Cir. 1985); *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985). Upon petitions for certiorari, both cases are presently pending before the United States Supreme Court. The following opinion has been prepared in view of those proceedings at the request of Gerling-Konzern Allgemeine Versicherungs-Aktiengesellschaft, Cologne, Federal Republic of Germany. Gerling is the insurer of product liability risks to both petitioners.

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I. Summary

As indicated by diplomatic interventions of the German, British and French governments, the Anschütz and Messerschmitt cases raise serious issues of international law. From the point of view of international law, the opinions below can in fact not be upheld. Correction may result from applying U.S. procedural law in conformity with international law as the law of the land or, preferably, from reconsidering the application of comity under U.S. law in a manner that is in accordance with the underlying rule of international law. If, for whatever reason, conformity with international law is not reached, the U.S. would be liable towards Germany under the international law of responsibility.

The relevant rule of international law does not directly derive from the Hague Evidence Convention which is inconclusive as to its relation to such domestic procedures of taking evidence as are under review here. But the Convention or, more precisely, the availability of Convention procedures is of indirect importance under the controlling rule of customary international law which is: In exercising its procedural jurisdiction, a state has to accommodate conflicting foreign state interests, especially by adopting compromise solutions designed to reconcile domestic and foreign interests.

The foregoing rule reflects the common denominator of views, held in practice and legal doctrine, on the broader problem of extraterritorial jurisdiction. Causing the transfer of evidence from a foreign state to be produced before domestic courts is an instance of exercising extraterritorial jurisdiction.

To apply that rule of customary international law, an assessment of German and U.S. interests has to be made not unlike applying comity principles under U.S. law. In doing so, two factors which, it is submitted, the court below failed to understand have to be taken into consideration:

(1) Germany's interest in the protection of its judicial sovereignty would be seriously affected if evidence were removed from German territory as a result of U.S. court orders to that effect. Parties and witnesses residing in Germany are, under the German constitution, entitled to expect the taking of evidence to be operated by German courts.

(2) The U.S. has an interest in granting plaintiffs before U.S. courts access to the necessary evidence even as regards foreign defendants controlling evidence located abroad. But that interest may well be served by first taking recourse to Convention procedures which, as German-U.S. practice of legal assistance has demonstrated, offer access to the contents of documents even at the pretrial stage so that the production of documents themselves could be ordered for trial.

In reconciling those interests, the above rule of customary international law requires plaintiffs to proceed as follows: In the present first phase of litigation, plaintiffs have to use the channels of the Convention. If, contrary to experience, plaintiffs still need further evidence to prepare trial, there is time for U.S. courts, in a second phase, to come back to the question of ordering, at the request of plaintiffs, the transfer of evidence from Germany to the U.S.

II. The International Law Issues in Anschütz and Messerschmitt

In both Anschütz and Messerschmitt, product liability suits have been brought against the German manufacturers of boat steering devices (Anschütz) and of helicopters (Messerschmitt). Defects of an Anschütz steering device allegedly contributed to the collision of a Spanish owned vessel with a ferry landing at the mouth of the Mississippi River, causing damage to the landing and several other boats. Defects of a Messerschmitt helicopter allegedly contributed to a crash, near McKinney, Texas, in April 1982, causing the death of three occupants.

The district courts, finding to have personal juristion over the respective defendant, ordered the production of documents located in Germany and the deposition of some of each defendant's employees also located in Germany. According to the Anschütz opinion, the evidence is to be taken in the United States "[i]f Anschütz is not voluntarily forthcoming in Germany." [3] In Messerschmitt, that condition already formed part of the opinion of the district court which was confirmed by the court of appeals.[4]

Both cases are not on taking evidence in a foreign state. They are on taking evidence from a foreign state. The witnesses and the documents would have to be transferred from Germany to the United States for the purposes of taking evidence in the United States. If the court orders were to be confirmed, the German defendants would, in case of non-compliance, face sanctions which could be enforced within U.S. territory as long as the defendants own property there. The enforceability of the U.S. orders is not open to doubt. The question, however, is whether ordering the transfer of the evidence is in conformity with international law.

International law comes in as treaty law. The Federal Republic of Germany and the United States of America are both parties to the Convention on Taking Evidence Abroad in Civil or Commercial Matters which was signed at the Hague on March 18, 1970 and which is, therefore, often referred to as the Hague Evidence Convention. The court of appeals denied the Convention to have an impact on the application of the U.S. Federal Rules of Civil Procedure. That conclusion will be reexamined under the aspect of treaty law in Section III of this opinion.

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[3] Anschütz, at 615.

[4] Messerschmitt, at 730.

Customary international law comes in as well. Causing conduct in Germany, that is causing the transfer of evidence that would in Germany be exclusively for German courts to order, may have affected Germany's judicial sovereignty. The court of appeals, applying comity principles of U.S. law, did not find an infringement of German sovereignty as long as the evidence was not actually taken in Germany without German consent. Whether the mere absence of physical intrusion really removes the possibility of any violation of customary international law protecting German sovereignty, will be discussed in Section IV.

A violation of customary international law, as it will indeed be established, may be avoided by reconsidering the application of comity principles of U.S. law. A short observation to that effect in Section V will conclude the opinion.

It may be noted at this point that the violation of the customary international law rule protecting German sovereignty could only have been waived by Germany itself and not by any of its nationals.[5] Far from waiving any right, the German government intervened as amicus curiae in Anschütz, which came to be considered the lead case, and voiced protests on the diplomatic level. The international law issue has not become moot.

III. Treaty Law: The Hague Evidence Convention

The Hague Evidence Convention entered into force for the Federal Republic of Germany on June 26, 1979.[6]

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[5] For a similar view cf. Pierburg GmbH and Co., KG v. Superior Court of Los Angeles County, 186 Cal. Rptr. 876, at 882 (1982); Coopers Industries Inc. v. British Aerospace Inc., No. 83 Civil 6366 (DNE) (S.D.N.Y. 1984).

[6] Bekanntmachung über das Inkrafttreten des Haager Übereinkommens über die Beweisaufnahme im Ausland in Zivil oder Handelssachen vom 21. Juni 1979, Bundesgesetzblatt 1979, Teil II, 780.

As of that date, the Convention is binding upon both states involved in the present dispute since the U.S. had already become a party to the Convention as of October 7, 1972.[7] In the following, the availability of procedures of taking evidence in Germany under the Hague Evidence Convention (Convention procedures) will be discussed at first (Subsection 1). Afterwards the discussion will turn to the question of whether the availability of Convention procedures is in any way limiting access to U.S. procedures of taking the evidence from Germany (Subsection 2). The analysis will be conducted as a matter of treaty interpretation only. The impact which the availability of Convention procedures may have under customary international law or under U.S. law will be examined in Section IV and V respectively.

1. Availability of Convention Procedures

In Anschütz, the court of appeals stated: "The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules."[8] This is correct but beside the point: It is correct that the Hague Evidence Convention provides for various procedures of taking evidence in a foreign state, while no procedures of taking evidence from a foreign state are provided for under the Convention. Yet the question is whether Convention procedures, if available, should be used instead of taking recourse to U.S. procedures to transfer to the U.S. witnesses residing in Germany and documents located in Germany. The whole argument depends on whether Convention procedures are indeed available in the instant cases. That question will, therefore, have to be examined before any conclusions could be drawn regarding the impact on access to U.S. procedures. Availability of convention procedures is, in

[7] 23 U.S.T. 2555, T.I.A.S. No. 7444.

[8] Anschütz, at 615.

this context, understood to signify first that the convention is applicable at all and second that its procedures are suited to produce the evidence sought for in the particular case.

The applicability of the Convention follows from just one requirement: The presence of a civil or commercial matter. The instant claims for damages, based on product liability, qualify as such civil or commercial matter. In that respect, the court of appeals rightly expressed no doubt in either case.

The passage from Anschütz quoted above and some accompanying language could be understood to deny the applicability of the Convention whenever the domestic court finds personal jurisdiction over a party-witness. The Convention, however, does not make the absence of personal jurisdiction a requirement of its applicability. From the U.S. law point of view, Bernhard H. Oxman argued: "The decision to assert in personam jurisdiction over a foreign defendant in a civil action does not, and should not, involve a detailed enquiry as to the reasonableness of subjecting that person's property, employees, and affiliates throughout the world to the compulsory power of the court." [9] From the point of view of international law, as may be added, limiting the applicability of the Convention to cases in which municipal law does not extend in personam jurisdiction to the respective witness would hardly make sense. There may well be situations in which evidence located abroad could only be reached through the channels of the Convention even though personal jurisdiction may be present, e.g. when a sanction could not be enforced for lack of property located within the state attempting to take the evidence.

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[9] Bernhard H. Oxman, The Choice between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention, 37 UnivMiamiLRev 733, at 740 (1983).

In Anschütz and Messerschmitt, the Convention is brought into play by the foreign location of the information on the products in question. The practical availability of such procedures, however, will have to be assessed in some detail, first regarding the depositions demanded by plaintiffs (Subsection 1 a) and then regarding the orders for the production of documents (Subsection 1 b).

a) The Taking of Depositions

In both cases, plaintiffs are requesting the deposition of expert witnesses belonging to the personnel of the defendant manufacturer. Could such depositions be handled through the channels of the Convention? That question does not relate to the procedures of taking of evidence "without compulsion" by diplomatic officers under Chapter II of the Convention.[10] In view of the objections raised by Anschütz and Messerschmitt, it only relates to legal assistance under Chapter I of the Convention. In proceeding under Chapter I, the following points have to be considered:

Letters of request may under Article 1 (2) "not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated." That requirement seems sufficiently broad to cover even requests for discovery at the pretrial stage if the discovery is at all directed towards the objectives of the pending action. It may be assumed that the district courts ordering the discovery made sure of that requirement to have been met.

Article 3 of the Convention sets forth a number of formal requirements for specification of the request. Un-

[10] In addition to the Convention, see German note to U.S. Embassy in Bonn of October 17, 1979, and U.S. note to German Foreign Office of February 1, 1980, both published in: Bruno A. Ristau, International Judicial Assistance (Civil and Commercial), vol. II, at C I-78 et seq.

der that provision, U.S. judges may find themselves in a situation not familiar to them when having to specify the necessary evidence at a very early stage of the proceedings. Such scrutiny appears to be the price the U.S. had to pay for having its system of discovery included into a convention only dealing with the taking of evidence in its more narrow meaning. To provide that specification does not place an undue burden on U.S. courts. In practice, pretrial conferences might serve as an appropriate institutional framework.

Under Article 9 (1) of the Convention, Germany is, when executing a letter of request, entitled to apply its own procedural law regarding the form of taking the evidence. But at the request of the U.S., Germany would have to adapt its procedures to U.S. procedures unless entirely impractical or prohibited by German law (Article 9 (2)). Thus a German court would take verbatim records instead of having the judge summarize the statement made by the witness as is usual practice in Germany.

To be sure, Article 11 (1) (a) retains to witnesses deposed in Germany all the privileges of German law. In the instant cases, it is difficult to predict whether any of the grounds for refusing to testify as listed in Sections 383 and 384 of the German Code on Civil Procedure could become relevant. But, even if, for instance, an employee should under those provisions refuse to answer a specific question arguing that the answer might be evidence in support of claims against the witness himself, such refusal would be a significant fact allowing the U.S. court to draw its own conclusions. The protection of business secrets under Section 384 no. 3 of the German Code on Civil Procedure is usually construed narrowly. Whether it could bar disclosure of information regarding products manufactured quite some time ago, as was the case in Anschütz and in Messerschmitt, is doubtful. Prod-

uct liability suits before German courts are nothing out of the ordinary.

Finally, Article 12 (1) (b) authorizes Germany, being the requested state in the instant cases, to refuse to execute an eventual letter of request, if it "considers that its sovereignty or security would be prejudiced thereby." Neither product seems to be particularly sophisticated as to qualify as a matter of German security, and Germany could surely not invoke its "judicial" sovereignty when asked to execute a letter of request under a binding international treaty. Nor did the German government refer to any other element of its sovereignty as being affected.

To sum up, a request for the taking of depositions in Germany has a fair chance of being executed once the requesting courts make sure that questions to witnesses be specified in an adequate manner. Such prognosis seems confirmed by the astonishing extent to which Convention procedures have been used in German-U.S. practice shortly upon the Convention's entry into force: According to information supplied by the German Government in its amicus brief, 151 requests from U.S. courts were received in Germany during the period of 1979 to 1984. 131 of these requests were accepted and executed. Most of the 20 requests which were rejected either did not sufficiently identify the evidence to be taken or were for production of documents at the pretrial stage.[11]

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[11] Anschütz und Co. GmbH v. Mississippi River Bridge Authority, et al., No. 85-98, Supreme Court of the United States, Petition for writ of certiorari, Brief for the Federal Republic of Germany as amicus curiae of August 1, 1985; a scholarly investigation, privately undertaken for the same period, revealed a lower total, but about the same proportion of requests granted in relation to requests denied: 63 to 12 (Harald Koch, Zur Praxis der Rechtshilfe im amerikanisch-deutschen Prozessrecht, Ergebnisse einer Umfrage zu dem Haager Zustellungs- und Beweisübereinkommen, 5 Praxis des Internationalen Privat- und Verfahrensrechts, 245, at 247 (1985)).

b) The Production of Documents

In both cases, orders of taking evidence by way of production of documents were approved by the court of appeals. Could those orders be channeled through the Convention procedures as well?

Among the 17 contracting states (by the end of 1984), Germany is one of the 13 states to have made a declaration under Article 23 of the Convention to the effect that execution of letters of requests "issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries" is severely restricted or excluded altogether. Germany, indeed, unmistakingly declared: "Requests for judicial assistance having as their object a procedure as defined in Article 23 of the Convention will not be executed." [12] In addition, the Federal Minister of Justice was authorized to adopt, with the consent of the Federal Council, a representation of Länder governments serving as a second chamber of parliament, a regulation providing for the execution of such requests to the extent that "they do not violate basic principles of German procedural law, and . . . that the legal interests of the individual involved are taken into account." [13] Such regulation not yet having been adopted, requests for the production of documents in Anschütz and Messerschmitt would not be executed at the present pretrial stage of the proceedings.

The practical impact of the foregoing conclusion, however, has to be seen in the light of two alternatives to requests for the production of documents at the pretrial stage: Such requests could be substituted by depositions to be taken at the present pretrial stage, or the production of documents could be requested later at the trial stage of the proceedings. Both alternatives merit further exploration.

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[12] Bundesgesetzblatt 1977 Teil II, 3105, as translated by Bruno A. Ristau (note 10), at CI-84.

[13] Id., note 12.

In German court practice, it is common to hear witnesses as to the contents of special documents they have access to. For most practical purposes, therefore, a request for production of documents may be replaced by a request for deposing a witness on questions such as the minutes of meetings, the contents of instructions or even on possible defects of a product as established by blueprints and their alterations. In formulating the requests and in using the evidence, U.S. courts are asked for considerable adaptation to Convention procedures. But "accommodation of the different methods" of taking evidence is what the Preamble of the Hague Evidence Convention says international legal assistance is about. Such adaptation emanates from the legal obligation to implement the Convention and therefore has to be included into any assessment of what constitutes "best evidence" from the point of view of U.S. law.

Above all, substituting documentary evidence by depositions at the pretrial stage has stood the test of German-U.S. practice. The Permanent Bureau to the Hague Convention on Private International Law stated in its report on the operation of the Convention: "The decision of the Oberlandesgericht (Higher Regional Court) Munich of 27 November 1980 . . . illustrates that even where the requested state, as in case of the Federal Republic of Germany, has made an absolute reservation under Article 23, it may be possible to obtain information on documents which themselves could not be surrendered or produced, by way of the compulsory examination of third persons as witnesses concerning the contents of those documents." [14] In that case, the Bavarian Minister of Justice decided, on the one hand, to decline a request for

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[14] Hague Conference on Private International Law, Report on the Second Meeting of the Special Commission on the Operation on the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Prepared by the Permanent Bureau, July 1985.

the production of documents and, on the other hand, to grant a request for depositions. The decision of the Minister of Justice was confirmed on both counts by the Oberlandesgericht.[15] Counsel for the party seeking the evidence later reported "that the depositions could be taken only with respect to the material listed in the document request, even though the document request had been denied" and summarized his report by stating: "All things considered, the German depositions in the end worked out rather well." [16]

Requests for the production of documents at the trial stage will, unlike those at the pretrial stage, be entertained by Germany according to the general conditions set forth above regarding the deposition of witnesses. As a result, documents would have to be sufficiently specified to conform with Article 3 of the Convention. Yet a careful handling of depositions at the pretrial stage would enable one to be reasonably specific. No further adjustment of U.S. trial procedures seems required. Plaintiff would, as a result of pretrial depositions, have sufficient knowledge regarding the contents of the documents as to be able to decide on having them produced during trial. Such production of documents could, under Article 23 of the Convention and under the respective German declaration, be ordered well ahead of trial as long as such order would not have to be implemented before trial actually begins.

While it is true, therefore, that Germany would not execute a request for production of documents at the present stage, the unavailability of that particular means of evidence is offset by the availability of two other Con-

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[15] OLG München, Decisions of October 31, 1980 and of November 27, 1980, 9 VA 3/80 und 4/80, 20 International Legal Materials 1025, 1049 (1981).

[16] Charles Platto, Taking Evidence Abroad for Use in Civil Cases in the United States: A Practical Guide, 16 International Lawyer 575, at 584, 585 (1982).

vention procedures: extending depositions to the contents of the documents and postponing the production of documents to the trial stage. The Superior Court of New Jersey was right when it observed in Vincent v. Motobecane: "Moreover, if Vincent (scil. when using Convention procedures) is denied access to the actual documents themselves, it may still be able, even without them, to obtain the technical and commercial information it seeks." [17]

2. Inconclusiveness of the Convention as to its Relation to Domestic Procedures.

Having established that Convention procedures are indeed available for the purpose of taking evidence in the two instant cases, it may now be asked how the Convention rules on its relation to such domestic procedures as presently under review. Is the Convention exclusively applicable whenever its procedures are available? Does the Convention offer an option in addition to the availability of domestic procedures? Or does the Convention constitute the primary way of taking the evidence necessary in a particular lawsuit?

The Convention is on "the taking of evidence abroad." Its text does not seem to side with any of the above, nor any additional, alternatives. Under Article 27 of the Convention, contracting states are not prevented from "permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention." That clause should not be misread to relate to the internal law or practice of the requesting state. It merely states the obvious: The requested state may be more generous than provided for under the Convention and is free to grant assistance under Chapter I of the Convention or to permit the taking of evidence by diplomatic officers under Chapter II of the Convention in

[17] James Vincent et al. v. Ateliers de la Motobecane S.A., 475 A.2d 686, at 690 (N.J.Super.A.D. 1984).

greater breadth than the contracting parties were prepared to commit themselves to by treaty obligation.[18]

The parallel treaty, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965, states in its Article 1(1): "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." [19] In Anschütz, the court of appeals interpreted that clause to provide for the exclusiveness of the Service Convention in contrast to the Evidence Convention.[20] That is correct as regards serving documents abroad, but not as regards bringing about the same effect by domestic service, e.g. by publishing an announcement in the official journal to effectuate service against persons residing abroad. The German government, when submitting both Conventions to the Federal Diet for parliamentary consent, clearly stated that such other methods of bringing service to persons living abroad had not been ruled out.[21] To the question under review here, it is of no significance, therefore, that the Evidence Convention does not contain a provision similar to Article 1 (1) of the Service Convention.

The text of the Hague Evidence Convention not being just ambiguous but silent, there is no room for using imaginative techniques of interpretation. The Convention does not answer any of the above questions. It remains

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[18] For the same view cf. e.g. Philadelphia Gear Corp. v. American Pfauter Corp. et al., 100 F.R.D. 58 (E.D. Pa. 1983); Comment, the Hague Convention on the Taking of Evidence Abroad In Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad, 132 UPaLRev 1461, at 1476 (1984).

[19] 20 U.S.T. 361, T.I.A.S. No. 6638, Bundesgesetzblatt 1977 Teil II 1453.

[20] Anschütz, at 615.

[21] Bundesregierung, Denkschrift zu den Übereinkommen, Bundestags-Drucksache 8/217, 38, at 40-41 (1977).

inconclusive. Its relation to domestic procedures will have to be derived from a rule of law separate from the Convention itself. The respective rule of customary international law will be for the next section of this opinion to establish.

IV. Customary International Law: The Protection of State Sovereignty.

Amicus briefs and diplomatic notes accompanying litigation before municipal courts signalize issues of extraterritoriality affecting state sovereignty. In fact, it was such reactions of foreign governments that gave rise to a give and take between the states which developed patterns of statute practice eventually to grow into rules of customary international law protecting state sovereignty.

In Anschütz, the court of appeals was by no means unsensitive to the international dimension of the case. It invited the German government and the U.S. Department of Justice to state their views, and, in its opinion, it subscribed to the need of avoiding "any infringement upon German sovereignty." [22] The court, however, could not find an infringement unless the evidence were taken in Germany. Similarly, in Messerschmitt, the court first acknowledged Germany's legitimate concern, but was then satisfied to find the balance of comity considerations to be in favor of the U.S. since the order for the production of documents would not require "any governmental action in Germany," and as to the expert witnesses, comity principles were, in the court's view, not implicated at all.[23]

In the following, the discussion will focus first on establishing the rule of customary international law on the protection of state sovereignty when evidence is taken from abroad (Subsection 1). Thereafter that rule will be applied to the facts of the Anschütz and Messerschmitt cases (Subsection 2).

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[22] Anschütz, at 615.

[23] Messerschmitt, at 732-733.

1. Accommodating Conflicting Interests of Foreign States

Taking evidence from a foreign state, rather than in a foreign state, is just one instance of the general problem of extraterritorial jurisdiction: Respecting the physical integrity of foreign territory, but causing conduct in foreign territory by way of domestic measures. In the case of taking evidence it is the domestic courts that order such foreign conduct, to wit, making a witness travel to domestic territory or collect documents and take them to domestic territory for production there.

The international law on extraterritorial jurisdiction as it developed in the fields of antitrust law, security exchange control law, export control law, etc. could not precisely be called well settled. Some basic tenets, however, are no longer controversial:

(1) Causing extraterritorial effects is not generally prohibited. Matters for regulation are transterritorial in nature and could not be split up and apportioned to the exclusive jurisdiction of the respective states.

(2) Causing extraterritorial effects is not generally permitted either. A free-for-all of extraterritorial regulation would, by establishing conflicting demands, disorientate decision-making of individuals and create general chaos.

(3) Exercising extraterritorial jurisdiction is in conformity with international law if the foreign state where the extraterritorial effects are to occur is, neither generally nor in the particular case known to be objecting.

What is the law when the foreign state, as in the instant cases, does raise objections? The general principle of sovereign equality demands, and the overall record of state practice confirms: Conflicting interests of foreign states have to be accommodated, especially by adopt-

ing compromise solutions; if no compromise solution can be found, states are not permitted to take such measures as would cause greater harm to foreign interests than do good for domestic interests.

To what extent a state is obligated to defer to greater interests of foreign states may still be a matter of controversy. The first draft of the Restatement of Foreign Relations Law (Revised) was very vague in that respect when it stated in § 403 (3): ". . . Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in Subsection (2)." [24] Yet the latest draft, to be submitted for final approval at the Institute's Annual Meeting in May 1986, contains the following new text of § 403 (3): "(3) When more than one state has a reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by two or more states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction in light of all the relevant factors, including those set out in Subsection (2), and should defer to the other state if that state's interest is clearly greater." [25] In the opinion of this writer, the last part of the provision would have to read: ". . . each state has an obligation . . . to defer to the other state if that state's interest is greater." [26] There is, however, no need to elaborate on the evidence for that thesis here since the first part of the above rule, regard-

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[24] The American Law Institute, Restatement of the Law, Foreign Relations Law of the United States (Revised), Tentative Draft No. 2 (1981).

[25] The American Law Institute, Restatement of the Law, Foreign Relations Law of the United States (Revised), Final Draft, to be published shortly.

[26] Cf. Karl M. Meessen, Antitrust Jurisdiction Under Customary International Law, 78 AmJInt'lL 783 (1984); idem, Extraterritoriality of Export Control: A German Lawyer's View of the Pipeline Case, 27 German Yearbook of International Law 97 (1984).

ing the accommodation of interests of foreign states, suffices to deal with the instant cases at this stage as will be shown in Subsection 2 of this Section.

The international law obligation to accommodate interests of foreign states has, probably for the first time, been formulated in § 40 of the Second Restatement of Foreign Relations Law in 1965. There, in cases of concurrent jurisdiction of two or more states, each state was stated to be "required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states, . . ." [27] In the meantime, U.S. courts, partly relying on U.S. law principles of comity, have brought ample proof of both the existence and the practical operability of the rule.[28] The final decision in Timberlane of 1984 [29] confirmed the rule, and the 1984 decision of the Court of Appeals for the District of Columbia Circuit in Laker [30] is not to the contrary since the limitations to the application of comity mentioned there leave unaffected the obligation to accommodate such foreign interests as are not "fundamentally prejudicial to those of the domestic forum." [31]

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[27] The American Law Institute, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

[28] Cf. e.g. Restatement in the Courts, Cumulative Annual Pocket Part For Use In 1985-1986, Reporting All Cases Through June 1984 that cite Restatement of the Law, Second, Foreign Relations Law of the United States, at 61 et seq. (1985).

[29] Timberlane Lumber Co., et al., v. Bank of America N.T. & S.A. et al., 749 F.2d 1378 (9th Cir. 1984), cert. denied, 105 S.Ct. 3514 (1985).

[30] Laker Airways Limited v. Sabena, et al., 731 F.2d 909 (D.C. Cir. 1984).

[31] Laker v. Sabena (note 30), at 937; for a general evaluation of the Laker opinion cf. Meessen, Antitrust Jurisdiction (note 26), at 786 et seq., 801 et seq.

In the Restatement of Foreign Relations Law (Revised), the accommodation of foreign interests has been included into the broader principle of "reasonableness" which states as an international law obligation to evaluate i.a. "The likelihood of conflict with regulation by other states." [32] Even the Court of Appeals for the Fifth Circuit, as may be gathered from its reference to comits,[33] does not seem to be objecting to the existence of an obligation to accommodate foreign state interests. But, in cases on the taking of evidence "from, not in, a foreign state," the court seemed determined never to find any need for such accommodation since effects on foreign sovereignty were practically ignored. It is this application of the rule that was inadequate as will be demonstrated in the following subsection.

2. Applying the Rule on the Accommodation of Foreign Interests

The international law rule again is: In exercising jurisdiction, a state has to accommodate conflicting interests of foreign states, especially by adopting compromise solutions.

To the American reader, applying that rule will very much look like applying comity principles of U.S. law. Both rules are in fact interrelated: The state practice underlying the international law rule substantially draws from U.S. case law developed under comity considerations, and that case law may, as will be shown in the next Section, continue to be applied if kept short of an infringement of international law.

To apply the international law rule, it is suggested to start by assessing foreign, i.e. German, interests (Subsection 2 a), then to proceed to an assessment of U.S. interests (Subsection 2 b), and finally to discuss an ac-

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[32] The American Law Institute (note 28), § 403 (1) and (2) (h).

[33] See above notes 22 and 23.

commodation of the interests of the two states involved (Subsection 2 c).

a) German Interests

As has been mentioned at various instances, the German government intervened in Anschütz and lodged a formal diplomatic note on November 29, 1985. That attitude towards taking of evidence may be traced back to the German answer to a questionnaire distributed in 1968 to prepare the drafting of the Hague Evidence Convention: "Furthermore the hearing of a witness in a judicial proceeding constitutes an act of sovereignty which may only be performed by a judge or any other agent legally authorized." [34] The U.S. delegation that had taken part in the drafting of the Convention clearly understood the point made by the German government and other governments when it used the following formulation in its report: "In drafting the Convention, the doctrine of 'judicial sovereignty' had to be constantly borne in mind. Unlike the common-law practice which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers obtaining of evidence a matter primarily for the courts, with the parties in the subordinate position of assisting the judicial authorities." [35] The term "judicial sovereignty" precisely designates what the German government is concerned about. Those concerns will, however, have to be explained in greater detail.

In Messerschmitt, the court of appeals remarked that "American discovery procedures may indeed inconven-

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[34] Conference de la Haye de droit international prive, Actes et documents de la onzieme session, 7 au 26 octobre 1968, tome IV, Obtention des preuves a l'etranger, at 22 (1970)—author's translation from the French original.

[35] U.S. Delegation to the 11th session of the Hague Conference on Private International Law, Report of April 1969, 8 International Legal Materials 785, at 806 (1969).

ience the German civilian judicial system." [36] To many Germans who are involved as parties or witnesses in U.S. discovery proceedings, the situation is not just inconvenient, but frightening. The frightening aspect is not that they have to reveal the truth for the purposes of a specific claim brought before the court. They would have to do so under Convention procedures as well. The frightening aspect rather is that many matters would have to be revealed without ever being of any use for the ongoing litigation. German firms would not understand if their business operations in Germany, not just those in the U.S., were hampered for a considerable period of time by having to answer lengthy interrogatories, to disclose hundreds of files of documents and to give leave of absence to employees for depositions in the United States. As regards the production of documents, German defendants could not, unlike U.S. defendants, ease matters by allowing inspection to take place in Germany, since this would mean exercise of U.S. judicial authority within a foreign state, which is, if objected to by that state, clearly prohibited. In the case of a foreign witness, therefore, there is no way to control into whose hands the information disclosed might be passed on. Competitors might obtain valuable information. German witnesses are also concerned about the need to retain U.S. counsel for the purpose of preparing in Germany the taking of evidence in the United States and for the purpose of responding by requests for broad discovery against the plaintiff. German firms and individuals feel professional privileges to be undercut and business secrets to be jeopardized. The bargaining aspects of some of those campaigns for discovery and U.S. practice of paying contingency fees to lawyers cause additional resentment.

The German attitude should not be misinterpreted as in any way criticizing the U.S. judicial system as such.

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[36] Messerschmitt, at 732.

It only results from unfortunate experiences caused by the interplay of the two systems whenever U.S. style discovery became effective in Germany. The German position has to be seen in the context of German procedures on taking evidence and of their constitutional background.

Court control of civil litigation in Germany has aptly been described as "conference method." [37] As regards the taking of evidence, three different phases could, perhaps, be distinguished although it would depend on the complexity of the case to what extent these phases could overlap or coincide: [38]

(1) On the basis of two comprehensive pleadings, the one containing the complaint and the other one the defense, the judge will try to find out what the parties are aiming at and on what grounds, in his view, the claim and the defense could possibly be based. He will pay special

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[37] Benjamin Kaplan/Arthur T. von Mehren/Rudolf Schaefer, Phases of German Civil Procedure, 71 HarvLRev 1193, 1443, at 1471 (1958).

[38] For a comprehensive English language description, the author's preference for the German system left aside, cf. John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823 (1985); cf. also Rolf Bender/Christoph Strecker, Access to Justice in the Federal Republic of Germany, in: Mauro Cappelletti/Bryant Garth (eds.), Access to Justice, Volume I, Book II, at 551 et seq. (1978); Hartwig von Westerholt/Peter Lantz, Litigation in Civil Courts, in Bernd Rüster (ed.), Business Transactions in Germany, Volume I, Chapter 5, at 5-34 et seq (1983); Donald R. Shemansky, Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation, 17 International Lawyer 465 (1983); Peter Gottwald, Simplified Civil Procedure in West Germany, 31 AmJCompL 687 (1983); Axel Heck, Transnational Litigation: Federal Republic of Germany and the E.E.C., 18 International Lawyer 793 (1984); Hans Schima/Hans Hoyer, Ordinary Proceedings in First Instance: Central European Countries, in: International Encyclopedia of Comparative Law, Volume XVI, Chapter 6, p. 6-130 (1984).

attention to isolating the factual allegations necessary to support the various legal points and to finding out which of those facts have been admitted and which are still being contested by the other party and, therefore, have to be established through the taking of evidence. Even if a party is represented by counsel, the judge might find it necessary to suggest to supplement factual allegations and/or requests for taking evidence.

(2) The judge will then hear the parties, perhaps urge a settlement and decide about the taking of evidence as to those of the factual allegations that are both relevant and contested. The taking of evidence may be ordered by a formal ruling, by an informal letter to both parties or by a more or less casual observation made during the hearing. To some extent, judges have the authority to order the taking of evidence not requested by either party in order to get a more accurate account of the relevant facts.

(3) The actual taking of the evidence is carried out before court and under the direction of the judge. In particular, it will be the judge who extensively examines the witness and, only afterwards, allows for additional questions by counsel of each party. The judge then formulates a summarizing report of what the witness has said, always focusing on the relevant facts and those circumstances which throw light on the credibility of the witness. During the taking of evidence the judge makes sure that privileges of parties and third persons receive adequate protection even when no objections were raised to that effect.

Aiming at a rapid and correct conclusion of litigation is an objective Germany shares with the U.S. The

prominent role of the judge in controlling the taking of evidence, however, marks a notable contrast, not to other civil law countries, but to the U.S. Overcoming the laissez-faire liberalism of the 19th century, Germany gradually introduced welfare state notions into private litigation. The welfare aspect is that neither the parties nor third persons should suffer from poor presentation of their case often due to inadequate counseling which in turn may, but need not, result from a lack of financial resources. The judge, as both impartial and active director of the proceedings, has to redress any imbalances of advocatorial skills, and he has to take care that the final judgment be as close to objective truth as possible.[39]

Today, that attitude is firmly established as a matter of constitutional law. The principle of welfare state is a binding principle of German constitutional law as is, of course, the equal protection clause.[40] Both provisions have repeatedly been applied in constitutional reviews of decisions of last instance in civil litigation. Thus the Federal Constitutional Court vacated a judgment of an ordinary court on the ground that the court should have exempted the party from a formally binding term.[41] It also vacated a ruling on a compulsory auction, pointing out that the judge should have advised the applicant to

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[39] Wolfram Henckel, Vom Gerechtigkeitswert verfahrensrechtlicher Normen, passim (1966); Karl August Bettermann, Verfassungsrechtliche Grundlagen und Grundsätze des Prozesses, 94 Juristische Blätter, 57, at 63 (1972); Rudolf Wassermann, Der soziale Zivilprozess, Aufklärung im Zivilprozess, at 38 et seq. (1982); for a short English-language reference to the concept see Peter Gottwald (note 38), Rolf Bender/Christoph Strecker (note 38) and especially Langbein (note 38), at 831 and 843.

[40] Basic Law of May 23, 1949, Articles 20 (1) and 3 (1); an English translation is published in: Amos J. Peaslee, Constitutions of Nations, 3d ed., vol. III, at 357 et seq. (1968).

[41] Bundesverfassungsgericht, Ruling of April 29, 1980, 54 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 117, at 124-125.

withdraw the application for commercial reasons,[42] and in another case, that the judge himself should, in the absence of the party, have postponed the auction for the same reason.[43] In a case concerning social security procedures, the Federal Constitutional Court argued that the failure of the statute to provide for advocatorial assistance was compensated by the courts controlling by themselves the process of taking evidence.[44]

There is another interrelated point of constitutional law explaining the German emphasis on "judicial sovereignty": the principle of proportionality. Proportionality is among the most frequently applied rules of constitutional law. It derives from the "Rechtsstaatsprinzip," the German equivalent to the due process clause, and it requires measures that interfere with private rights to be strictly limited to situations in which interference is both unavoidable and justifiable in view of reaching certain legitimate objectives.[45] The objective in this context is to hear and to decide upon a private claim submitted to private litigation. Under the principle of proportionality, therefore, the rights of personal privacy, commercial property, and business secrets may not be interfered with unless such interference is necessary to protect other persons' rights in the course of civil

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[42] Bundesverfassungsgericht, Ruling of March 24, 1976, 42 BVerfGE 64, at 78-79.

[43] Bundesverfassungsgericht, Ruling of April 24, 1979, 51 BVerfGE 150, at 156 et seq.

[44] Bundesverfassungsgericht, Ruling of January 22, 1959, 9 BVerfGE 125, et seq.; cf. also Bundesverfassungsgericht, Ruling of July 25, 1979, 52 BVerfGE 131, at 144 et seq. and Bundesverfassungsgericht, Judgment of July 1, 1980, 54 BVerfGE 237, at 273.

[45] For a recent discussion, with further references to doctrine and court practice, see Klaus Vogel/Wolfgang Martens, Gefahrenabwehr, 9th ed., at 389 et seq. (1986).

litigation.[46] As seen from this angle, court control of taking evidence is again required, else the taking of evidence could be too broad and would turn into discovery unrelated to the particular claim. It has to be emphasized, however, that the evidence that is really necessary for bringing a plausible claim may in most circumstances be freely taken, of course under court control. The comparison of privileges under German law and under U.S. law is not at issue.[47] The real issue is that in Germany the judge has to protect individuals against unnecessary attempts of disclosure and to grant whatever absolute privileges may be applicable.

To sum up, no objections against the substance of the product liability suits having been raised, at present it is only Germany's "judicial sovereignty" that is at stake. Yet Germany's judicial sovereignty is affected to a considerable extent. German defendants, and deponents and expert witnesses living in Germany, are being exposed to procedures of taking evidence which are in conflict not only with the German law and practice of civil procedure, but also with basic constitutional notions, such as the welfare function of the judiciary and the maintenance of proportionality in civil litigation. Both opinions under review, it is submitted, suffer from a failure to understand the dignity of those interests forming part of German judicial sovereignty.

b) U.S. Interests

It naturally is within the interests of the U.S. to allow its courts to deal with any claims properly brought be-

[46] Karl Heinz Schwab/Peter Gottwald, Verfassung und Zivilprozess, at 67 (1984); proportionality being an undisputed guideline under German public law, there has not yet been any need for an extensive discussion of its application to civil procedure.

[47] As to this point, see Peter Schlosser, Internationale Rechtshilfe und rechtsstaatlicher Schutz von Beweispersonen, 94 Zeitschrift für Zivilprozessrecht, 369 passim (1981).

fore them in such a way as to be as close as possible to objective truth. In Anschütz, the court of appeals repeatedly stated that it saw no reason to confine discovery as against a defendant subject to its personal jurisdiction merely for the reason of the defendant's foreign nationality or of the foreign location of the evidence.[48] Similarly the court in Messerschmitt took note of the "American litigants' interest in promptly obtaining the documents and deposition testimony necessary to prepare for complex litigation in an American court . . ." [49]

From the U.S. point of view, administration of justice indeed does not protect either Anschütz or Messerschmitt against any taking of evidence just because of their foreign nationality or of the foreign location of the evidence. But whether such protection will be granted would have to be examined in view of the availability of alternative means to obtain the evidence necessary to establish the facts relevant for a disposition of the claims. As has been elaborated above,[50] Convention procedures give access to the necessary evidence located in Germany. To be sure, using the channels of the Hague Evidence Convention may seem more cumbersome to the American plaintiff. But that option cannot be ignored when it comes to an accommodation of interests as it will be explained in the following Subsection.

c) Accommodating German and U.S. Interests

In the instant cases, a compromise could be reached by proceeding in two different phases: If, in a first phase, Convention procedures were used, German interests in judicial sovereignty would be fully respected while U.S. interests in obtaining the necessary evidence would either be met as well, if the litigation is concluded, or would,

[48] Anschütz, at 609, 611 et seq.

[49] Messerschmitt, at 732.

[50] Supra at 11-18 of this opinion.

if no conclusion is reached, at most be suspended temporarily. U.S. courts could always, in a second phase, be asked to protect remaining U.S. interests by taking such measures as may then be necessary in order to have the evidence transferred from Germany into the U.S.

The court of appeals in Anschütz was quick in rejecting a second balancing under comity principles since it believed such balancing would always be in favor of the U.S. and would therefore constitute "the greatest insult to a civil law country's sovereignty." [51] The court's conclusion is, it is submitted, not warranted, since it rests on the wrong assumption that using the channels of Convention would lead to nowhere. Experience tells, however, that upon using the Convention procedures the situation is likely to be quite different from what it is now.

The whole issue might, for various reasons, have become moot by then. The depositions could have produced sufficient information to go to trial. Or plaintiff could be prepared to drop the claim or to settle. If plaintiff felt the need of continuing discovery in order to prepare trial, the issues would nevertheless have been clarified to some extent. Requests for further information under the Convention could be formulated more precisely. Above all, production of reasonably identifiable documents could be prepared for the trial stage.

In view of the broad spectrum of possible developments, going through a first phase of using Convention procedures does make sense even to the U.S. U.S. plaintiffs will just have to overcome their natural antipathy against using procedures unfamiliar to them. Their interest in obtaining the necessary evidence being granted, allowance for different procedures must be made if evidence is located abroad. Equal treatment of domestic

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[51] Anschütz, at 613.

and foreign evidence means to provide an equal chance in adequately reaching the overall objectives of civil litigation. It does not suggest undiscriminate application of the same rules to situations as different as those.

Furthermore, such "enlightened" interpretation of domestic interests [52] would also have to take into account the possibility of adverse reaction on the part of the foreign state in question. The U.S. might not mind U.S. defendants being exposed to a taking of evidence outside the channels of the Convention. Yet, there may be other reactions. The United Kingdom, for instance, has demonstrated that foreign defendants in U.S. lawsuits could, in the foreign state, be provided with a basis for reclaiming there whatever they were coerced to grant in the U.S.[53] Germany would certainly be most reluctant to engage in such retaliatory action. But it is not Germany alone that is involved in disputes regarding domestic taking of evidence from abroad. It may, therefore, be worthwhile to remember that the balance of power as it is presenting itself in the instant cases could well be changed in favor of the foreign party since, in view of the worldwide spread of commercial property, enforcement would raise no serious problems.[54]

To sum up, in both Anschütz and Messerschmitt, German and U.S. interests are to be reconciled by going through the Convention channels first and, if at all necessary, by coming back to the question later whether and to what extent U.S. courts should, by themselves, order the taking of evidence from Germany.

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[52] Cf. Meessen, Antitrust Jurisdiction (note 26), at 798 et seq.

[53] For a recent survey of cf. Gary B. Born, Recent British Responses to the Extraterritorial Application of United States Law: The Midland Bank Decision and Retaliatory Legislation Involving Unitary Taxation, 26 VirgJInt'lL 91 (1985/1986).

[54] For the related point of U.S. enforcement of U.S. orders see above at 6.

V. Conflict Avoidance Under Comity Principles

Regarding state jurisdiction, international law only provides for a minimum standard which every state has to respect. Normally, states keep clear of any violation of that minimum standard by applying national rules of conflict laws which are tailored to the needs of each particular state. Comity has always been the primary instrument of U.S. law to avoid international conflicts likely to generate violations of international law. It would, therefore, be by applying comity principles that the U.S. could avoid violating the above rule of international law on the accommodation of interests of foreign states.

The U.S. principles of comity seem to be sufficiently open to permit U.S. Courts to assess properly the weight of German judicial sovereignty and to reassess U.S. interests in view of the availability of Convention procedures in the instant cases. This writer, therefore, is confident that a realistic application of comity principles will make unnecessary any direct reference to international law. If, however, applying comity principles does not first suggest exhausting Convention procedures, such result would have to be reached by applying international law as the law of the land, lest the United States be exposed to international responsibility vis-a-vis the Federal Republic of Germany.

Chicago, Illinois, March 31, 1986

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